SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1132

WILLIAM D. ARNOLD, FLOYD W. McKINSEY, ABRAHAM BARON, WARREN H. CHURCHILL, ROBERT W. ASH, HORACE W. HOWLAND, CHARLES McGUIRE, ROBERT COHEN, PAUL LEE BLUFF, STEVEN Z. KRSTICH, MICHAEL MALETA, ANGELO J. MASI, RUDOLPH C. DE LUNA, W. H. HOPKINS, PATRICK J. GERMON, JAMES C. DENNIS, JAMES NELSON HOPKINS

Plaintiffs and Petitioners

vs.

BERT R. TIFFANY, STEPHEN RATKOVITCH, LLOYD SPENCE, HARRY L. CLARKE, JOE CAPPONI, ROBERT D. NELSON, VANCE L. STICKELL, THE TIMES MIRROR COMPANY, WES SPAULDING

Defendants and Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the courts below correctly refused to extend the reach of Section 1985(3) of the Civil Rights Act of 1871 to a claim that 17 independent newsdealers were deprived of their First Amendment right to peaceably assemble by the purely private, allegedly discriminatory conduct of defendants which was not based on race, religion, national origin or other similarly invidious grounds.

STATEMENT OF THE CASE

A. The Nature of the Case

The Complaint in this action was filed on February 12, 1973 in the United States District Court for the Central District of California seeking preliminary and permanent injunctive relief and damages under Section 1985(3) of the Civil Rights Act of 1871, Title 42 of the United States Code.[1] The action was brought by 17 independent newspaper dealers on their own behalf, and not for the benefit of any class, against The Times Mirror Company ("Times Mirror"), publisher of the Los Angeles Times ("The Times"), seven of its officers or employees, and against one other independent newspaper dealer. [Clerk's Transcript ("CT"), pp. 1-7.]

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[1]Although the Complaint charges violations of Sections 1981 and 1982, plaintiffs admitted in the District Court that if Section 1985(3) did not apply the other two sections were also inapplicable. Reporter's Transcript, Proceedings of February 26, 1973, p. 47; Reporter's Transcript, Proceedings of March 2, 1973, pp. 10-12, 13-14. See also the Memorandum and Order Granting Motion to Dismiss, Petition for a Writ of Certiorari ("Petition"), Appendix A, p. ii. Since plaintiffs did not challenge this finding by the District Court in the Court of Appeals or in their Petition, it is apparent that they waive any contention as to the applicability of Sections 1981 or 1982 to this case. *United States v. Spector* (1953), 343 U.S. 169, 96 L.Ed. 863, 72 S.Ct. 591, *reh. denied*, 343 U.S. 951, 96 L.Ed. 1353, 72 S.Ct. 1040; *Iob v. L.A. Brewing Co.* (9th Cir. 1950), 183 F.2d 398, 401.

The crucial allegation of the Complaint is contained in Paragraph (20), which charges that "defendants have conspired with invidiously discriminatory animus to deprive on a class-wide basis Los Angeles Times newspaper dealers including plaintiffs of the equal protection of the laws through intimidating, harassing, causing economic injury and coercing said dealers from exercising their rights under the First and Fourteenth Amendments to the United States Constitution to peaceably assemble." [CT pp. 7-8.]

B. The Course of the Proceedings

In the District Court for the Central District of California, defendants[2] moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that plaintiffs had failed to state a claim for relief. In granting that motion, the District Court, in its Memorandum and Order, a copy of which is attached to the Petition for a Writ of Certiorari ("Petition") as Appendix A, stated, in pertinent part:

> "The case that controls the disposition of defendants' motion is *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1970 [*sic*] (1971).
>
> "In *Griffin* the Court held that §1985(3) did apply to private conspiracies. The Court, however, carefully limited its holding by stating: 'That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. * * * The constitutional

[2]Throughout this brief, the parties will be referred to by their designation in the District Court, *i.e.*, petitioners will be called "plaintiffs" and respondents will collectively be referred to as "defendants".

shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.' (References omitted). *Griffin, supra,* at 101, 102, 91 S.Ct. at 1798.

"The Court then explained that '[t]he language [used by the sponsors of the limiting amendment] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory "animus behind the conspirators" actions.' Id. (Emphasis in original). [Footnote omitted.]

"In short, '[t]he motivation aspect of §1985 (3) focuses * * * on invidiously discriminatory animus.' Id. at note 10. Plaintiffs do not claim that defendants were motivated by racial animus. The critical question which this Court must then decide is what other 'kind of invidiously discriminatory motivation'—in addition to racial bias—did the Court have in mind when it used the words 'class-based, invidiously discriminatory animus.'

"A close reading of *Griffin* leads to [*sic*] this Court to conclude that the words 'class-based, invidiously discriminatory animus' refer, at most, to that kind of irrational and odious class discrimination akin to racial bias—such as discrimination based on national origin or religion. The complaint alleges no such discrimination.

"Furthermore, for this Court to conclude that §1985(3) was intended to embrace the class urged here—a newspaper dealers' trade association—would, in effect, amount to treating that section as a general federal tort law.

"Accordingly, defendants' motion to dismiss under F. R. Civ. P. 12(b)(6) is granted, plaintiffs' pending motion for injunctive relief is denied, and the complaint is dismissed."

Memorandum and Order Granting Motion to Dismiss, Petition, Appendix A, pages iii and iv.

The Court of Appeals for the Ninth Circuit affirmed the dismissal of plaintiffs' complaint by the District Court. A copy of that opinion is attached to the Petition as Appendix B. In its opinion, the Court of Appeals first noted that the District Court had correctly held the Supreme Court's decision in *Griffin v. Breckenridge* (1971), 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1790, to be controlling. *Arnold v. Tiffany,* Opinion of the Ninth Circuit, Petition, Appendix B, p. vii. The Court then acknowledged the ruling of the District Court, *id.* at viii, but chose to affirm on the other ground.

The Court of Appeals concluded:

"The class, in the present case, is composed of over four hundred newspaper dealers of the Los Angeles Times, each of whom has an independent contract with the Los Angeles Times. The appellants are seventeen of these dealers who allege that the appellees conspired to violate their right of association in forming and maintaining a

newspaper dealers' association. The flaw appears in the appellant's syllogism when the 'animus' alleged herein is compared to that in *Griffin*. There the motivating hostility was derived from the fact that the plaintiffs were black, members of a racial class against which animus existed, and that the defendants believed them to be civil rights organizers. But here, the appellants were not injured because they were newspaper dealers, the class alleged but because of their activities in attempting to maintain a dealer association. The animus is directed at and derived from the dealer association and is divorced from the fact that there is a class of newspaper dealers." [Footnote omitted.]

Arnold v. Tiffany, Opinion of the Ninth Circuit, Petition, Appendix B, pp. x-xi.

Plaintiffs now seek a second review of the District Court's opinion by way of their petition for a writ of certiorari.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUE PRESENTED

Plaintiffs' Complaint, [CT, pp. 1-26], contains no allegations of any state action in support of defendants' alleged derelictions, nor does it allege any impediment to plaintiffs' rights to travel in interstate commerce. Similarly, the Complaint does not charge any form of discrimination based on religion, national origin, sex or age. Plaintiffs specifically admitted in the District Court that there was no racial motivation on any defendants' part [RT, Proceedings of February 26, 1973, p. 17, lines 17-23], and that they did not wish to plead further. [RT, Proceedings of February 26, 1973, pp. 47-48.] Thus, this case involves the decision of a business entity to terminate its relationship with an independent contractor, allegedly because the business disagreed with the aims of the trade association of which the contractor was a member.

ARGUMENT

This Case Does Not Present Issues Which the Supreme Court Should Decide by the Issuance of a Writ of Certiorari

Plaintiffs' Petition ignores the fact that the granting of a writ of certiorari is not designed to give the defeated party in the court of appeals another hearing. As pointed out below, this case does not fall into any of the categories outlined in Rule 19 of the Supreme Court Rules. Moreover, the statutory construction advocated by plaintiffs would raise a substantial question as to the constitutionality of that legislation. The courts below correctly avoided that construction.

A. The Rulings of Both of the Courts Below Were Clearly Dictated by the Holding of This Court in Griffin v. Breckenridge and Should Not Be Disturbed.

In the present case, the District Court for the Central District of California dismissed plaintiffs' action because their Complaint failed to state a claim upon which relief could be granted. The District Court held that the decision of the Supreme Court in *Griffin v. Breckenridge* was controlling, and ruled:

> "A close reading of *Griffin* leads this Court to conclude that the words 'class-based, invidiously discriminatory animus' refer, *at most*, to that kind of irrational and odious class discrimination akin to racial basis—such as discrimination based on national origin or religion. The complaint alleges no such discrimination." [Emphasis added.]
>
> Memorandum and Order Granting Motion to Dismiss, Petition, Appendix A, p. iv.

The ruling by the District Court was squarely in keeping with the holding and the spirit of *Griffin*. Thus, while every case decided under Section 1985(3) of Title 42 of the United States Code ("Section 1985 (3)") has been based on racial discrimination, plaintiffs' complaint, appeal and this Petition have all been based on the rather startling proposition that one may invoke the jurisdiction of the Federal Courts under the Civil Rights Act of 1871 merely by alleging that a small group of individuals, who share the same occupation and have similar objectives concerning the enterprise with which they deal, are a "class" within the meaning of Section 1985(3). Plaintiffs base this novel contention on their reading of the *Griffin* decision.

Plaintiffs claim that *Griffin* establishes that an action under Section 1985(3) can be based on the traditional ground of racial discrimination, *or* it can be based on other "class-based" discrimination. *Griffin* does not stand for that proposition at all. This is what *Griffin* said:

> "[T]here must be some racial, or *perhaps* otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" [Emphasis added.]
>
> *Griffin v. Breckenridge*, 403 U.S. 88, 102.

Footnote 9 states:

> "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of §1985(3) before us."
>
> *Griffin v. Breckenridge*, 403 U.S. 88, 102 n. 9.

Because *Griffin* clearly did involve racial discrimination, the Court did not have to resolve the question of whether some invidiously discriminatory animus based on a class other than race *might* meet the requirement of Section 1985(3). Plaintiffs have not cited a single case decided under Section 1985(3) in which the court has held that non-racial discrimination would be sufficient.

Plaintiffs have glossed over the issue of the racial discrimination requirement under Section 1985(3) by citing cases, Petition, pp. 26-29, which clearly involve state action in support of defendants' alleged wrongdoing. *Azar v. Conley* (6th Cir. 1972), 456 F.2d 1382, is relied upon on the strength of dictum contained in a footnote. *Id.* at 1396 n.5. *Kletschtka v. Driver* (2nd Cir. 1969), 411 F.2d 436, involved another statement in dictum made by a Court of Appeals, but this statement was made *prior* to the decision in *Griffin*. Moreover, in that case, the Court of Appeals reversed a decision of the District Court dismissing a suit under Section 1983 of Title 42 of the United States Code, *id.* at 447-49, but affirmed the Court's decision dismissing plaintiff's claim under Section 1985(3). *Id.* at 447. *Griffin* does not detract from the accepted notion that the Ku Klux Klan Act was designed to implement the Thirteenth and Fifteenth Amendments and that a complaint under Section 1985(3) must be tied to the evils which the Amendments and the legislation were designed to cure.

If the application of Section 1985(3) is to be extended to purely private discrimination based on factors other than race, the logical extension would be to apply the statute only to discrimination against a class of persons united by those fundamental, human char-

acteristics considered by the Supreme Court under the Equal Protection Clause of the Fourteenth Amendment to be "suspect" when used by a state government as a basis of classification, that is, to religion, national origin, sex and, possibly, age. Defendants submit that, at most, it was these "suspect" classifications which the Court had in mind when it said in *Griffin* that *perhaps* other class-based discriminations *might* be covered by Section 1985(3). 403 U.S. at 102. Plaintiffs do not allege discrimination on the basis of any of these natural characteristics of people. There is simply a small group of individuals who claim their status as a class solely because they share the same occupation and have similar objectives concerning the enterprise with which they deal.

Plaintiffs claim that defendants' acts have been part of a conspiracy to deprive them of the equal protection of the laws.[8] [CT, p. 8.] This small group of plaintiffs—newspaper dealers—hardly raises itself to the level of a "class" in the sense that word is used in the context of civil rights. It is merely a group of individuals engaged in the same occupation and dealing with the same company. As the District Court below noted, "for this Court to conclude that §1985(3) was intended to embrace the class urged here—a newspaper dealers' trade association—would, in effect, amount to treating that section as a general federal tort law." Memorandum and Order Granting Motion to Dismiss, Petition, Appendix A, p. iv.

If Section 1985(3) is indeed to be extended to cover a member of this business association, it must similar-

[8]Of the more than 400 Times dealers in the Los Angeles area, only 17 dealers are involved in this litigation.

ly cover the members of any group of people who form an association to further any common purpose or interest. The terminated individual could always allege that his right to association was being denied by the termination and bring an action under Section 1985 (3).

The "class" of members of a business association is thus not the type of class to which the application of Section 1985(3) should be extended, even if it were to be held that that statute was intended to prohibit private, non-racial discrimination. The Congress that passed this post-Civil War statute popularly known as the Ku Klux Klan Act could not possibly have intended that the legislation apply to the facts of this case.

The decision of the District Court was thus in keeping with the holding of this Court in *Griffin* and with the rulings of numerous other decisions by courts of appeals and district courts. Therefore, there is no lack of uniformity justifying the supervisory jurisdiction of this Court.

Plaintiffs apparently would also bring themselves within Rule 19 of the Supreme Court's Rules by their statement that the "Court of Appeal's rationale in this case runs completely counter to this Court's reasoning in *Griffin*." Petition, p. 31.

Plaintiffs' argument ignores the fact that *Griffin* holds only that "[T]here must be some racial, or *perhaps* otherwise class-based invidiously discriminatory animus behind the conspirators' action." [Emphasis added; footnote 9 omitted.] *Griffin v. Breckenridge*, 403 U.S. at 102. Footnote 9 affirms that the question of bias based on characteristics other than race was not before the Court.

Clearly, the case at bar is not one involving race. Moreover, this case is not one involving a "suspect" classification, which the District Court stated to be the maximum possible reach of Section 1985(3). The Court of Appeals affirmed the District Court's decision, but on the narrower ground that plaintiffs' allegations did not suffice to meet the parameters of *Griffin*, whatever they might be, because the animus alleged was not directed at the class specified. The Court analogized its ruling to that of the Court of Appeals for the Fourth Circuit in *Hughes v. Ranger Fuel Corp.* (1972), 467 F.2d 6. See Opinion of the Ninth Circuit, Petition, Appendix B, p. vi.

Plaintiffs argue that the ruling of the Ninth Circuit would have required dismissal in *Griffin* also. Plaintiffs claim that in *Griffin*, as in the present case, the animus was directed at and derived from only the civil rights activities of the petitioners in that case and was divorced from the fact that there was a class of blacks. The language of the Court in *Griffin*, however, shows that plaintiffs' assertion is wrong. In examining the complaint to determine whether it stated a cause of action under Section 1985(3), the Court stated:

> "These allegations clearly support the requisite animus to deprive the petitioners of the equal enjoyment of legal rights *because of their race*." [Emphasis added.]
>
> *Griffin v. Breckenridge*, 403 U.S. 88, 103.

The animus in *Griffin* was thus directed against blacks, not just civil rights workers.

In the present case, as pointed out by the Ninth Circuit, the alleged animus is directed at the dealer association, not the alleged class of all newspaper deal-

ers. Thus, the ruling of the Court of Appeals in this case is entirely consistent with and follows this Court's holding in *Griffin*.

The only conflict of decisions among the circuits which plaintiffs note is that pertaining to the question of whether Section 1985(3), if applied to the facts of this case, would render the statute unconstitutional for lack of congressional power to enact the legislation. See Petition, page 36 n. 7. That question was not reached by either the District Court or the Court of Appeals, so this conflict need not be resolved in the context of the present case.

B. To Interpret Section 1985(3) as Plaintiffs Proposed Would Raise a Substantial Question as to the Constitutionality of the Statute.

Whether or not one is inclined to confine Section 1985(3) to private discrimination based on race, under the holding of the Supreme Court in *Griffin v. Breckenridge* it is still necessary in every case "to identify a source of congressional power to reach the private conspiracy alleged by the Complaint. . . ." 403 U.S. at 104. Defendants submit that, in the context of the Complaint in this case, to hold Section 1985(3) applicable would render that statute unconstitutional and void as applied, since no source of congressional power would support that application. *Dombrowski v. Dowling* (7th Cir. 1972), 459 F.2d 190. *Contra, Action v. Gannon* (8th Cir. 1971), 450 F.2d 1227 (en banc).

Plaintiffs ignore an elementary principle of constitutional law, that is, that Congress cannot create a fed-

eral cause of action in the absence of some specific Constitutional delegation to Congress of the power to make the violation actionable. In *Griffin*, that power devolved from Section 2 of the Thirteenth Amendment, which gave to Congress the power to eradicate the vestiges of slavery. 403 U.S. at 105. The Court also found authority in the power of Congress to protect interstate travelers from private discrimination. *Id.* at 106.

In the present case, plaintiffs' Complaint does not allege racial discrimination, and plaintiffs' counsel admitted to the District Court that there were no racial overtones to this suit. [RT, Proceedings of February 26, 1973, p. 17.] Similarly, the Complaint may be searched in vain for any allegation of a violation of plaintiffs' right to interstate travel. [CT, pp. 1-26.] What is alleged is a violation of plaintiffs' right to "the equal protection of the la /s" by the alleged action of defendants in preventing plaintiffs "from exercising their rights under the First and Fourteenth Amendments to the United States Constitution to peaceably assemble." [CT, p. 8.] Nonetheless, it is clear that these freedoms are only protected against Federal governmental interference by the Bill of Rights, and from state interference by incorporation into the Fourteenth Amendment.

Nowhere in the Constitution is Congress given the general power to enact legislation designed to protect these rights from purely private discrimination. It is clear that Congress has not attempted, in enacting Section 1985(3), to pass such legislation. Indeed, in the

recent Supreme Court decision in *Moose Lodge No. 107 v. Irvis* (1972), 407 U.S. 163, 32 L.Ed.2d 627, 92 S.Ct. 1965, the Supreme Court reaffirmed "the essential dychotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.'" 407 U.S. at 172.

Because neither of the courts below accepted the construction of Section 1985(3) proposed by plaintiffs, however, this question was neither reached nor resolved below, and need not be resolved here.

Conclusion

By indirection, plaintiffs would apparently assert that a writ of certiorari should be issued in this case either because the decision of the District Court for the Central District of California, or the affirming opinion of the Court of Appeals, is in conflict with applicable decisions of this Court. It is clear, however, that both opinions were dictated by the decision of this Court in *Griffin v. Breckenridge*. The only issue on which plaintiffs cite any conflict among the lower courts pertains to an issue not reached below. Moreover, a reading of the cases makes it apparent that Section 1985(3) cannot be applied to the facts alleged, nor can that statute be read as plaintiffs would read it, without raising a substantial issue as to the constitutionality of the statute. Defendants submit that the decision of the District Court was correct and

that the defendants' motion to dismiss under Rule 12 (b)(6) of the Federal Rules of Civil Procedure was appropriately granted.

Defendants respectfully pray that the Petition for a Writ of Certiorari be denied.

Dated: February 22, 1974.

Respectfully submitted,

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